UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:	)	
	)	
DAVID M. HUFFINE and	)	CASE NO. 02-63313 JPK
INGRID HUFFINE,	)	Chapter 7
	)	
Debtors.	)	

ORDER DETERMINING SANCTIONS UNDER
FED.R.BANKR.P. 7037/Fed.R.Civ.P. 37(d)(1)(A)(ii) AND 37(d)(3)

On May 18, 2009, GE Commercial Finance Corporation filed a motion for order to compel production of documents. A hearing on the motion was held on July 8, 2009, and at that hearing the court determined that the motion should be granted, and that GE Commercial Finance Corporation was entitled to sanctions pursuant to Fed.R.Bankr.P. 7037/ Fed.R.Civ.P. 37(d)(1)(A)(ii) and 37 (d)(3), comprised of "the reasonable expenses, including attorney's fees, caused by the failure [of the debtors' counsel to comply with the provisions of Fed.R.Bankr.P. 7034/Fed.R.Civ.P. 34]". The court entered an order on July 16, 2009 which required counsel for GE Commercial Finance Corporation to file an itemized statement of expenses which the creditor contended had been incurred as a result of counsel for the debtors' failure to comply with the provisions of Fed.R.Bankr.P. 7034/Fed.R.Civ.P. 34, by July 30, 2009. The required Statement was filed on July 20, 2009, and in accordance with the July 16, 2009 order, counsel for the debtors filed a timely objection to the Statement on August 12, 2009. On September 4, 2009, GE Commercial Finance Corporation, by counsel, filed its "GE Commercial Finance Corporation f/k/a Deutsche Financial Services Reply Memorandum of Law in Support of Attorney Fee Award".[1]

[1] This reply was neither required, nor invited, by the court. The July 16, 2009 order stated very clearly that if a timely objection was filed by counsel for the debtors, a hearing would be held on the statement and the objection thereto. Because the memorandum was filed of record, the court will consider it; however, counsel is advised by the court to save its clients from the expense of filing unnecessary and unwanted memoranda in subsequent matters before the court: the court will disregard memoranda of this nature in the future.

A telephonic preliminary pre-trial conference on the contested matter arising from the Statement and the objection thereto was held on September 17, 2009. At that conference, counsel for both parties acknowledged that the record for determination of an award of "reasonable expenses" under the court's July 16, 2009 order would be comprised of the Itemized Statement filed on July 20, 2009 [docket record entry #47]; the objection filed by counsel for the debtors on August 12, 2009 [docket record entry #52]; and the memorandum filed on September 4, 2009 [docket record entry #57]].

The issue presented to the court is the amount of the sanction to be awarded to GE Commercial Finance Corporation – in consonance with the court's order entered on July 16, 2009 – under Fed.R.Bankr.P. 7037/Fed.R.Civ.P. 37(d)(3).

The Itemized Statement filed by GE Commercial Finance Corporation's attorneys requests compensation of $9,170.00 for attorney's fees, and $179.85 for expenses. The debtors' response acknowledges that $1,800.00 could be awarded, but disputes the balance of the request by the creditor.

The discovery dispute presented to the court was a garden variety failure to strictly comply with requirements of the Federal Rules of Bankruptcy Procedure/Federal Rules of Civil Procedure in the context of responding to a motion for production of documents. The court emphasizes that the dispute presented to it was "garden variety", and a relatively small backyard garden at that. The underlying contested matter with respect to which the request for production of documents was served was a standard motion pursuant to 11 U.S.C. § 522(f)(1)(A) for avoidance of a judicial lien.[2] This was a routine matter, like so many §522(f)(1)(A) motions presented to the court on a "drop dead" basis over and over again by

[2] The court notes that GE Commercial Finance Corporation has apparently chosen to not oppose the motion: The extension granted to the creditor to respond to the debtors' "drop dead" notice expired without response. The debtor's motion has been granted by separate order.

debtors; the underlying contested matter is not an anti-trust case or a complicated avoidance action by a debtor or a trustee, or any other matter which has any complex legal or factual issues. The court determined by its July 16, 2009 order that the debtors' counsel did not comply with the requirements of applicable discovery rules with respect to a response to a discovery request, due to failure to provide a categorical written response to the request. Let's be clear. The lack of a required categorical written response to the request was the basis for the July 16, 2009 order: certain of the requested documents had been provided to the creditor's counsel, and other requested documents could have been easily obtained from other sources. But rules are rules: the award of sanctions was compelled by failure to comply with Fed.R.Bankr.P. 7034/ Fed.R.Civ.P. 34(b)(2)(B) and (C), and the resulting sanction provisions of Fed.R.Bankr.P. 7037/ Fed.R.Civ.P. 37(a)(3)(B), 37(d)(1)(A)(ii) and 37(d)(3). The court's determination does not in any manner imply that the underlying action to which the discovery request related was extraordinarily complicated, or involved a discovery request which, if not fully responded to, left the requestor without a significant amount of information necessary for the requester to defend against the underlying contested matter. The debtors' counsel's failure was a minor violation of discovery rules, but it was not "substantially justified", and there was no circumstance presented at the July 8, 2009 hearing which caused sanctions to be deemed "unjust". The court expects parties upon whom discovery requests are served to totally comply with rules relating to responses to discovery requests, and based upon that expectation the court entered its July 16, 2009 order. However, the court did not expect to be met with a sanction request for over $9,000.00 with respect to a garden variety matter.

Review of the Itemized Statement discloses that legal services with respect to the motion to compel production were performed by a partner of the law firm of Rubin & Levin, P.C., and by an associate of that law firm. Reasonableness of compensation as a sanction under Fed.R.Civ.P. 37(d)(3) is not measured by the amount of time expended, but rather is

measured by the amount of time that one could reasonably expect a litigant to expend with respect to a simple motion to compel production.

At the outset, the court acknowledges that N.D.Ind.L.B.R. B-7007-1(a) requires that a motion filed pursuant to Fed.R.Bankr.P. 7037 is to be accompanied by a legal memorandum. Rubin & Levin, P.C. commendably complied with this requirement. The question before the court in part relates to the reasonableness of the expenses asserted with respect to that compliance. A collateral issue is the reasonableness of attorney's fees incurred by utilizing attorneys from a firm based in Indianapolis, Indiana to attend a very simple hearing in Hammond, Indiana.

Review of the Itemized Statement discloses the following:

1. Expenses with respect to attorney's time related to the motion to compel itself included both the time of a partner and the time of an associate. Expenses related solely to the motion to compel are designated as being incurred on May 6, 2009, May 7, 2009, May 8, 2009, and in part on May 10, 2009 and May 11, 2009. The court deems the claimed expenses to be unreasonable.

Motions to compel discovery are motions governed by Fed.R.Bankr.P. 9013. This rule requires that a "motion shall state with particularity the grounds therefor and shall set forth the relief or order sought". This was a garden variety discovery dispute, and the court determines that a motion to compel production of documents which complies with Rule 9013 in the circumstances of this case should be produced in 1.0 hours, whether that motion is produced by a partner or by an associate.[3] The "reasonableness" of expenses to be awarded as a

[3] A reasonably crafted motion in full compliance with Fed.R.Bank.P. 9013 does not require detailed recitation of every letter and telephone call and fax utilized to seek to obtain a response to a discovery motion, nor exhibits which excruciatingly document those attempts. A conforming motion in a matter such as that presented to the court would state:

"_____ (Creditor) served a motion for production of documents on the debtors'

sanction is not to be determined by the manner in which an entity chooses to prepare its response. The court finds that the billing rate of $325.00 per hour for an associate in the firm of Rubin & Levin, P.C. is reasonable[4], and that therefore the preparation of the motion is compensable at that rate for 1.0 hours, thus resulting in sanction compensation for attorney's fees for preparation of the motion to compel discovery of $325.00. In the context of the Itemized Statement, the court will allow 1.0 hours of the itemization stated on May 7, 2009 for "JMB". The court denies as unreasonable the claim for additional attorney time on May 7, 2009 of "JMB"; the claim for time of "JCH" on May 7, 2009; the claim on May 8, 2009 for "JCH" and "JMB"; and any other attorney time encompassed within the Itemized Statement with respect to preparation of the motion to compel.

The court determines that a reasonable expenditure of time to prepare a memorandum in support of a motion compel, under the circumstances of this case, is 2.5 hours, and that is

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> counsel on _____; a copy of the request is attached as Exhibit "A" to this motion. The debtors failed to comply with Rule _____ (cite Rule) by failing to timely provide a categorical written response to the request (and/or by otherwise failing to timely produce all of the requested documents) without an expressed adequate or reasonable justification or objection. The undersigned attempted on (date), (date), (date) and (date) to obtain compliance with the production request, but those attempts did not result in compliance. The undersigned certifies that the movant has in good faith conferred, or attempted to confer, with the debtors' counsel in an effort to obtain compliance without court action."

If one chooses to go beyond this simple format, one has wasted both one's and the court's time. This court always sets hearings on motions to compel, and it is at this hearing that one "speaks" to the court in detail if one so chooses – not in the motion and its accompanying legal memorandum.

[4] In addition to disputing the amount of time spent by the creditor's counsel, the debtors' counsel has questioned the reasonableness of the billing rate, and invites the court to adopt a standard more reflective of general billing rates for bankruptcy counsel whose practice centers in Northwest Indiana. The court will not do that. In fact, certain counsel whose practice is almost exclusively limited to bankruptcy cases in this Division charge hourly rates equivalent to those proposed to be charged here. The court, however, does determine that involvement of two attorneys in a routine matter such as this was unnecessary, and that the time expended by a partner involved in this matter was unnecessary, and thus was unreasonable. The hourly rate of $325.00 charged for an associate is reasonable.

being generous. The court deems the claimed expenses in this context to be unreasonable. If a law firm chooses to adopt a policy of review of associates' work – an experienced associate at that -- by a partner, that is the firm's choice. That decision does not reflect on what is reasonable to expect in federal litigation as a standard for compensation. Extensive research regarding the issues relating to a motion of the nature of that filed in this case is not necessary, and neither is draft/re-draft/re-draft necessary. The court assumes that associates employed by a law firm of the nature of Rubin & Levin, P.C. have background in the simple law applicable to a motion of this nature, as the court assumes to be true of any attorney practicing in any federal trial court. Thus, any claim of expenses for preparation of a memorandum in excess of 2.5 hours by an associate at the rate of $325.00 per hour is deemed by the court to be unreasonable. The court allows $812.50 for the preparation of the legal memorandum which was required to accompany the motion. In the context of the Itemized Statement, the court allows 2.5 hours of "JMB" time on May 10, 2009. The court disallows as unreasonable any other time for "JMB" on May 10, 2009; and the entries for May 11, May 13 and May 18, 2009 with respect to preparation of a legal memorandum

The foregoing determines compensation for the itemized entries in the Itemized Statement, with the exception of the entry on May 6, 2009, and the entries beginning on July 2, 2009 with respect to matters relating to the hearing on the motion filed by the creditor.

With respect to the entry on May 6, 2009 – "Review correspondence from debtors' attorney and documents attached thereto" – this entry has only in part to do with whether or not a motion to compel was necessary. A portion of this time is deemed to relate to review of the correspondence itself, which would have been necessary whether or not the response complied with the requirements of applicable rules. The balance of the time asserted for May 6, 2009 is arguably attributable to the insufficiency of the response to the request for production of documents. Because the time has not been broken down for May 6, 2009, the court

determines that .5 hours is compensable as a sanction, and .5 hours is not. Thus, $162.50 is awarded as a sanction with respect to the time expended on May 6, 2009.

We now come to preparation for the hearing on July 8, 2009. The Itemized Statement asserts that a total of 4.4 hours was spent in preparation for the July 8, 2009 hearing. A portion of this time was incurred by a partner, apparently in reviewing matters relating to the hearing and advising an associate as to matters relating to the hearing; and a portion of the time was involved in preparation by the associate for the hearing. As stated previously, this was a "garden variety" hearing with respect to a motion to compel discovery, and having expended the time stated in the Itemized Statement with respect to preparation of a motion to compel discovery and a brief in support of that motion, the court would anticipate that very little time would be necessary for preparation for the actual hearing. The court deems the claimed expenses to be unreasonable. Given the foregoing, and the nature of the discovery dispute and the scope of the hearing necessary to deal with that dispute, the court deems one-half hour to be sufficient to prepare for the July 8, 2009 hearing. Thus any time claimed in the Itemized Statement for July 2, 2009 through July 7, 2009 in excess of one-half hour is deemed unreasonable. Time expended for preparation for the hearing is awarded compensation as a sanction in the amount of $162.50.

Lastly, we come to the hearing itself on July 8, 2009. GE Commercial Finance Corporation chose to be represented by an Indianapolis law firm with respect to a routine 11 U.S.C. § 522(f)(1)(A) motion filed in the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division. That is the choice of the creditor. It is fully understandable that a creditor, having made that choice, would desire that the chosen legal representative appear before the court with respect to any matter relating to representation of that creditor. However, the court notes that there are extremely capable attorneys in the Northern District of Indiana, Hammond Division, who appear routinely as local counsel on behalf of creditors in the

circumstances presented by the motion to compel, and that the resulting fee to the client for that appearance – as fully effective as if the chosen firm in Indianapolis had appeared – is significantly less than that generated by sending an attorney from Indianapolis, Indiana to Hammond, Indiana for a brief hearing on a routine motion. If the court were to adopt a rule that required the use of local counsel in a circumstance such as that presented by this matter as the measure of "reasonable expense", the court would award up to $400.00 for attorney fees related to the July 8, 2009 hearing. However, at this time, the court will not impose a "local counsel" utilization requirement, and the court will review the July 8, 2009 entry in the Itemized Statement as being reasonable in the context of utilizing a firm in Indianapolis, Indiana to handle an extraordinarily routine matter in a court approximately 170 miles away, when in nearly every other case of the nature of this, a firm in Indianapolis, Indiana would have utilized local counsel and thus saved its client the expense evidenced by the July 8, 2009 entry.

Reviewing the July 8, 2009 entry in the context stated in the foregoing paragraph, being very generous, the court will allow one hour at the rate of $325.00 per hour for attendance at the hearing.

We now come to the issue of travel time to attend the hearing.

The court is very tempted to send a message to law firms in areas distant from the Hammond Courthouse to adopt the practice adopted by most major creditor firms in this circumstance, which is to utilize local counsel in routine matters to alleviate expense for both their client and potentially for debtors. The court has chosen to not do so in this matter, but the court hopes that the message sent by this decision has been received. N.D. Ind. L.B.R. B-9010-1(e) incorporates N.D. Ind. L..R. 83.5(e), and thus authorizes this court to require that certain matters involve representation by local counsel. The court construes this rule to authorize the court to require that certain routine matters involving a court appearance be handled by local counsel, a requirement the court deems itself to have the authority to impose

without the existence of the rule. It should also be noted that while this court goes out of its way to conduct telephonic conferences whenever feasible, when it is necessary to "make a record" – as it was with respect to the motion to compel – the use of a telephonic conference is not feasible.

In support of the assertion that time expended for travel at a full billing rate is "reasonable", GE has cited the case of *Henry v. Webermeier*, 738 F.2d 188 (7th Cir. 1984). In that case, the manner in which attorney's fees were computed by the trial court under the Civil Rights Attorney's Fees Award Act was deemed to be an abuse of discretion, in large part because the trial judge reduced billing rates to adjust the total amount claimed for attorney's fees, rather than separately determining the reasonableness of a billing rate and then applying that rate to a determination of the reasonableness of the hours expended on a particular activity. As GE correctly notes on page 2 of its response memorandum, the "lodestar" standard for determination of attorney's fees essentially requires separate determination of the reasonableness of a billing rate, applied to a separate determination of the reasonableness of the amount of time expended on a particular activity. The reasonableness of the time expended in travel is a separate matter. In *Henry, supra*, the United States Court of Appeals for the Seventh Circuit expressed the general proposition that the "lost opportunity cost" for travel time should result in a determination that the time expended in travel should be allowed at an ordinary billing rate. However, the discussion of this concept under headnotes 13, 14 and 15 of the decision was prefaced with the following statement: "Moreover, to award nothing for travel time in this case would be unreasonable", thereby implying that a <u>reduction</u> for travel time could be reasonable. It also needs noting that *Henry*'s legal determination was made with respect to awards of attorney's fees under the Civil Rights Attorney's Fees Awards Act, and that different policies could be deemed to apply under that Act than apply to general sanction awards under Fed.R.Civ.P. 37(d)(3).

But *Henry* further states:

> The presumption, which the defendants have not attempted to rebut, should be that a reasonable attorney's fee includes reasonable travel time billed at the same hourly rate as the lawyer's normal working time.

738 F.2d 188, 194. *Henry* appears to invite an "all or nothing" approach to travel time, an approach to which the court is bound in this case. If travel time is deemed to be reasonable, then the full amount of the reasonable time expended is compensable at an ordinary billing rate; if an adjustment to travel time is deemed to be necessary because the expended time is determined to be unreasonable, then the time itself is to be adjusted and the standard rate applied to the adjusted time. It is to be noted that the discussion of the reasonable compensation for travel time stated in *Henry* is premised upon the supposition that the law firm at issue in that case charged its clients the same rate for travel time as it did for other substantive legal time, a premise itself based on the fact that the defendants' counsel did not assert that the number of hours expended by the plaintiff's counsel was excessive (738 F.2d 188, 193; 195) – a different circumstance than that in this case, in which the debtors have challenged the reasonableness of expended time. The unchallenged expenditure of time can be viewed as a predicate for the application of the *Henry* presumption. While the court will not adopt that construction in this case, all are now on notice that this construction is fair game for the court to adopt in future matters.

There is another more important consideration at work here. It would be totally possible and foreseeable that a creditor having its principal office in Los Angeles, California would become involved in a matter such as that in this case [a motion for avoidance of a judicial lien under 11 U.S.C. § 522(f)(1)(A)], or a dispute as to the manner of treatment of its claim under a simple Chapter 13 plan, sufficient to require that creditor to file an objection to confirmation of that plan. This court requires a party filing an objection to confirmation of a Chapter 13 plan to

appear at the confirmation hearing by its attorney. Let's posit that the Los Angeles creditor is secured by a security interest in real estate, and that the value of the real estate exceeds the amount of the creditor's debt, thus invoking 11 U.S.C. § 506(b) [assuming a property contractual provision for recovery of attorney's fees by the creditor], or that attorney's fees incurred in processing a bankruptcy case are not subject to § 506(b) but that because of the status of the debt as a "long term debt", the underlying obligation is excepted from discharge and the fees can be added to the balance of the indebtedness owed subsequent to completion of the Chapter 13 case, even if a discharge under 11 U.S.C. § 1328(a) is obtained in that case. If that creditor would choose to send an attorney from a Los Angeles law firm to Hammond, Indiana for a five-minute hearing on its objection to confirmation, would the court deem that expenditure of time to be reasonable? The answer is: NO. A reasonable decision is to use local counsel in this context. One can parade this concept across the continent, and place the creditor and its law firm in Las Vegas, Nevada; in Topeka, Kansas; in St. Louis, Missouri; in Cleveland, Ohio; in Pittsburgh, Pennsylvania; or in New York City. The court would not deem the travel expense in this context to be "reasonable", but rather would determine that a reasonable expense would arise from the use of local counsel for the routine matter in which that creditor was involved. That is the circumstance here. The focus of a motion to compel discovery is to bring a discovery dispute to the attention of the court. The focus of N.D.Ind.L.B.R. B-7007-1(a)'s requirement of the filing of a brief in support of a motion filed pursuant to Rule 7037 is to weed out the frivolous or unnecessary motions to compel from those which have enough substance that a party deems it necessary to file a motion to compel production to obtain necessary information, rather than just to harass or annoy. This court always sets a preliminary pre-trial conference or a final hearing in a contested matter arising from the filing of a motion to compel discovery, and it is at that hearing that the full nature of the dispute is to be explained to the court. The court is fully aware of the law applicable to motions

of this nature and of the sanctions available for any failure to comply with discovery rules, and it is thus unnecessary to provide the court with either a detailed motion or a detailed memorandum to bring that dispute before the court. Ergo, the court's determination previously that a reasonable expenditure of time for a motion is 1.0 hours and a reasonable expenditure of time for a memorandum is 2.5 hours. Similarly, it borders on the "unreasonable" for a creditor to utilize a law firm from a distant location to represent it in a simple hearing on a routine matter. As previously stated, the court will stop short in this case from establishing a rule that representation of a party in a matter such as this may be effectively and reasonably accomplished solely by the use of local counsel. However, in future cases the court may well determine that in order to invoke the "presumption" stated in *Henry v. Webermeier, supra* in routine matters such as that involved here – when the total expended time is challenged as excessive – it must be established that travel time is in fact billed to all clients at the same rate as is substantive legal time, and is expected to be paid by clients at that rate; and that utilization of local counsel was not a reasonable option.[5] This foundation is lacking in this matter, but because it is adopting a construction of a seemingly controlling case which could not have been anticipated, the court will follow the general *Henry* rule in this matter. The court will allow six hours of travel time as reasonable, at the rate of $325 per hour. Thus, compensation for travel time of Jeffrey M. Boldt is awarded in the amount of $1950.00.

The Itemized Statement requests "Travel Expense Reimbursement" in the amount of $179.85 for July 9, 2009. The hearing was held on July 8, 2009, and thus this entry has no reference to anything in this case. There is also no itemization of this expense, and the court is

[5] The court may also require that routine matters of the nature of that involved here are to be presented by local counsel.

left to guess what it connotes. The expense is therefore completely disallowed.[6]

Based upon the foregoing, the court determines that the "reasonable" amount of the sanction to be imposed is $3737.50.

IT IS ORDERED that GE Commercial Finance Corporation is awarded sanctions pursuant to Fed.R.Bankr.P. 7037/Fed.R.Civ.P. 37(d)(3) in the amount of $3737.50.

IT IS FURTHER ORDERED that Attorney Kevin Schmidt shall pay this amount within 30 days of the date of entry of this order, by payment made to the law firm of Rubin & Levin, P.C. on behalf of the creditor.

Dated at Hammond, Indiana on November 9, 2009.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtors, Attorney for Debtors
Trustee, US Trustee
Attorney for Credtor

[6] For future reference, the reasonable expense component – apart from attorney's fees – for travel will be limited, in a properly claimed request, to actual expenses incurred. In the case of driving an automobile, the actual expense incurred is the cost of gasoline, and not whatever formula a law firm might use for reimbursement of an employee driving his or her own car to and from a hearing. Actual tolls or other out-of-pocket travel expenses will also be allowed.